In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1056

HOKE BOOTH, DAVID LOYD MEADOW, AND WILLIAM SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of carrying on the business of a distillery without having given the required bond, in violation of 26 U.S.C. 5173 and 5601(a), and received varying sentences of imprisonment.[1] The court of appeals affirmed *per curiam* (Pet. App.).

[1] Petitioner Booth was sentenced to confinement for two years; petitioner Meadow to two-and-one-half years; and petitioner Smith to one year and one day.

336-590—69

The sole issue raised in the present petition, as below, concerns the denial of petitioners' pre-trial motion to suppress evidence. The record shows that Special Investigator Barrineau of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service arrested petitioners Booth and Meadow in the living room of a house at about 8:30 p.m. on February 1, 1967 (Tr. 9–12). At about the same time, other federal agents arrested petitioner Smith and another at a nearby still site (Tr. 24). Agent Barrineau testified that the arrest in the house was made on the basis of information received from two other agents that on January 25, 1967, they had investigated a distillery approximately one hundred and twenty-five yards from the house and had found an electric line which they traced (without entering the curtilage)[2] to the rear of the house. The only path to the distillery ran through the yard of the house (Tr. 14–15, 21). On January 31, 1967, the two agents had observed petitioners and others perform a variety of activities around the house (*e.g.*, the unloading of sugar) consistent with the operation of a still (Tr. 15–17). And, just prior to making the arrest, Barrineau himself saw (with the aid of binoculars) petitioner Booth wave a car which contained petitioner Smith down

[2] Petitioner's assertion (Pet. 4–5) that the agents' testimony at trial showed that they had invaded the curtilage on January 25 is not supported by the record. Barrineau did testify, both at the motion to suppress and at trial, that on February 1, immediately prior to entering the house to make the arrests, he stooped down and saw the wire emanating from the house. See Tr. 14–15, 20, 60, 145–146. But it was the January 25 view, not this one, which contributed to probable cause.

toward the still location (Tr. 18). No search was made of the house incident to the arrest of Booth and Meadow, because the search warrant which the agents possessed authorized only a daytime search (Tr. 12), but the agents seized some papers from petitioner Meadow's person listing various inventory and equipment for the still and showing the purchase of materials connected with that occupation (Tr. 24–26, 33). The following morning the agents searched the house pursuant to the warrant and found a small quantity of nontaxpaid whiskey and distillery equipment (Tr. 27–28).

Petitioners' contention that the agents lacked probable cause for the arrest of Booth and Meadow in the house is without merit. The argument is based on the premise that the sole basis for the arrest was the tracing of the electric line to the house (Pet. 4, 6). But, as the trial judge found (Tr. 53–54) and the record reveals, the agents had significant additional evidence gained from personal observation, which showed petitioners' connection with the operation of the still. The totality constituted more than ample cause for the arrest.

Petitioners also contend that the search of the house was invalid because the affidavit in support of the search warrant was signed by the affiant-agent in the place reserved for the signature of the United States Commissioner (*i.e.*, after the words, "Sworn to and subscribed before me this 31st day of January 1967"), while the Commissioner signed on the opposite corner of the page (Tr. 48–49, 51–52). As the

trial judge found (Tr. 54), this was a minor error in form which did not vitiate the warrant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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